

DEPARTMENT OF LABOR AND INDUSTRY

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Sub-Chapter 1

Organizational Rules

24.8.101 PURPOSE AND SCOPE OF RULES; EFFECT OF PARTIAL INVALIDITY (1) The purpose of the rules in this chapter is to describe the procedures followed by the department of labor and industry (department) in investigating and conciliating complaints of discrimination and enforcing the laws prohibiting discrimination contained in Title 49, chapters 2 and 3, MCA. These rules apply to complaints of discrimination filed on or after July 1, 1997.

(2) The department will construe the provisions of the Act, the Code, and these rules with a view to affect their objects and to promote justice. A principal objective of the Act and Code is to assure that there will be no discrimination in certain areas of the lives of Montana citizens, except under the most limited of circumstances.

(3) In construing the provisions of the Act and Code, the department will refer to federal civil rights case law where it is both useful and appropriate and does not conflict with the purposes and intentions of state law.

(4) If a part of these rules is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of these rules is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid application or applications.

(5) The department may disregard nonprejudicial errors of law or procedure which do not deny a party due process, a fair hearing or fundamental justice. Parties who assign error for the violation of any rule have the burden to demonstrate that a failure to comply with these rules is in fact prejudicial or constitutes prejudice as a matter of law.

(6) Where strict adherence to these rules would cause undue hardship or create a substantial injustice to a party, the department may modify, waive, or excuse their application. The department may not modify, waive, or excuse mandatory acts which are required by statute or due process of law.

(7) Parties who choose not to be represented by counsel and who represent themselves must substantially comply with the provisions of these rules, subject to the provisions of (6). The department may modify the strict application of these rules to an unrepresented party to the extent they are not mandatory to assure fundamental fairness. (History: 49-2-204, MCA; IMP, Title 49, ch. 2, MCA; NEW, 2002 MAR p. 2908, Eff. 10/18/02.)

Rule 24.8.102 reserved

24.8.103 DEFINITIONS The following definitions apply throughout this chapter:

- (1) "Act" means the Human Rights Act, Title 49, chapter 2, MCA.
- (2) "Aggrieved party" means a person who can demonstrate a specific personal and legal interest, as distinguished from a general interest, and who has been specially and injuriously affected by, or is likely to be a victim of a violation of the Act or Code, as defined in 49-2-101, MCA.
- (3) "Charging party" means a person who files a discrimination complaint with the department or a federal agency with whom the department has a work-sharing agreement.
- (4) "Code" means the Governmental Code of Fair Practices, Title 49, chapter 3, MCA.
- (5) "Commission" means the human rights commission, a quasi-judicial board as established by 2-15-1706, MCA.
- (6) "Commissioner" means the commissioner of the department of labor and industry.
- (7) "Notice of dismissal and right to sue" means a document which terminates the jurisdiction of the department over a complaint under the Act or Code and which allows a charging party or aggrieved party to file a discrimination action in district court.
- (8) "Reasonable cause" means that a preponderance of the evidence supports a finding of unlawful discrimination. A finding of "reasonable cause" is equivalent to "merit" as provided in 49-2-504, MCA.
- (9) "Respondent" means any person against whom a complaint is filed. (History: 49-2-204, MCA; IMP, Title 49, ch. 2, MCA; NEW, 2002 MAR p. 2908, Eff. 10/18/02.)

Rule 24.8.104 reserved

24.8.105 APPLICABILITY OF COMMISSION RULES (1) In discharging its responsibilities for investigating and enforcing the laws prohibiting discrimination, the department applies the interpretive rules of the commission contained in ARM Title 24, chapter 9, sub-chapters 6 (Proof of Unlawful Discrimination), 10 (Sex Discrimination in Education), 12 (Maternity Leave), 13 (Insurance and Retirement Plans), and 14 (Guidelines for Employment). (History: 49-2-204, MCA; IMP, 49-2-204, MCA; NEW, 2002 MAR p. 2908, Eff. 10/18/02.)

Rule 24.8.106 reserved

24.8.107 RECORD KEEPING REQUIREMENTS FOR EMPLOYERS

(1) All employers, labor organizations, employment agencies, and government agencies shall maintain records pursuant to 49-2-102, MCA, and 42 USCA 2000e-8(c) and (d).

(2) All personnel records made or kept by an employer, including but not necessarily limited to, application forms and other records related to hiring, promotion, demotion, transfer, layoff or termination, rates of pay or other terms of compensation and selection for training or apprenticeship, shall be preserved for two years from the date the record is made or from the date of the personnel action involved, whichever occurs later.

(3) If a discrimination complaint is filed, the respondent shall preserve all personnel records relevant to the complaint until final disposition of the complaint. Personnel records relevant to a complaint include personnel records relating to the charging party and application forms or test papers completed by an unsuccessful applicant and all other candidates for the same position.

(4) Labor organizations shall preserve membership or referral records, including applications for membership or referral, for two years from the date the records are made. If a discrimination complaint is filed, a labor organization shall preserve all records relevant to the complaint until final disposition of the complaint. (History: 49-2-204, MCA; IMP, 49-2-102, MCA; NEW, 2002 MAR p. 2908, Eff. 10/18/02.)

Sub-Chapter 2

Complaints And Investigations

24.8.201 FILING OF COMPLAINTS (1) A complaint may be filed with the department by or on behalf of any aggrieved party. Complaints shall be filed with the department by mail addressed to the Human Rights Bureau, P.O. Box 1728, Helena, MT 59624-1728; personal delivery to 1625 Eleventh Avenue (USF&G Building, second floor), Helena, MT 59601; or fax to (406) 444-2798.

(2) Pursuant to 49-2-501(4)(a), MCA, and subject to 49-2-501(4)(b), MCA, a complaint must be filed within 180 days after the alleged act of discrimination occurred or was discovered.

(3) A complaint is considered to be filed on the date it is received by the department, either by mail, hand-delivery or facsimile.

(a) In the case of a complaint which is deferred or transmitted to the department by any government agency pursuant to any agreement entered into between the agency and the department, the complaint is deemed filed as of the date it was filed with or received by the agency which deferred or transmitted the complaint.

(4) When the department has reason to believe that a person is or has been engaging in a discriminatory practice in violation of the Act, the commissioner may file a complaint on behalf of the department pursuant to 49-2-210(1), MCA. A complaint filed by the commissioner may seek relief authorized by law for any and all persons adversely affected by the practice or actions. (History: 49-2-204, MCA; IMP, 49-2-210, 49-2-501 and 49-2-504, MCA; NEW, 2002 MAR p. 2908, Eff. 10/18/02.)

Rule 24.8.202 reserved

24.8.203 FORM OF COMPLAINTS (1) A complaint is a written document filed with the department. An aggrieved party or a person filing on behalf of an aggrieved party may draft and file a complaint.

Except as provided in (2), a complaint shall contain, at a minimum, the following information:

(a) full name, address and telephone number, if any, of the person making the complaint (hereinafter referred to as charging party);

(b) full name, address and telephone number, if any, of the person against whom the complaint is made (hereinafter referred to as respondent);

(c) a clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful discriminatory practice; and

(d) the verified signature of the charging party.

(2) For the purpose of timely filing, any signed written statement may be deemed a complaint if it sufficiently identifies parties and describes the actions being complained of. Such complaint may be verified by amendment after initial filing.

(3) A charging party must submit a verified complaint before the bureau will require a response from the respondent. The department will notify the charging party of the obligation to submit a verified complaint. If the charging party does not submit a verified complaint, the bureau will dismiss the complaint.

(4) If the charging party does not allege facts sufficient to constitute a short and plain statement of the claim showing that the charging party is entitled to relief under Title 49, chapters 2 and 3, MCA, the department will notify the charging party that the department does not have jurisdiction over the complaint, and the case will be dismissed unless the charging party amends the complaint to state a valid claim.

(5) Any person may file a complaint on behalf of any person claiming to be aggrieved if the person is the aggrieved party's guardian, attorney, or duly authorized representative or an advocacy group, labor organization, or other organization acting as an authorized representative. The person making the complaint must provide the department with the name and address of the person on whose behalf the charge is made. During its investigation, the department shall verify the authorization of such complaint by the person(s) on whose behalf the complaint is made. If the person on whose behalf the complaint is filed indicates in writing to the department that he or she does not wish the complaint processed, the department shall dismiss the complaint. (History: 49-2-204, MCA; IMP, 49-2-501, MCA; NEW, 2002 MAR p. 2908, Eff. 10/18/02.)

Rule 24.8.204 reserved

24.8.205 INTAKE PROCEDURE (1) A person claiming unlawful discrimination may contact the department by mail or telephone to inquire about filing a complaint of discrimination. Any advice or assistance provided to a potential charging party who contacts the department with questions about filing a complaint, or who seeks the assistance of the department in drafting a complaint, shall be offered objectively and impartially pursuant to 49-2-205, MCA. (History: 49-2-204, MCA; IMP, 49-2-205 and 49-2-504, MCA; NEW, 2002 MAR p. 2908, Eff. 10/18/02.)

Rule 24.8.206 reserved

24.8.207 NOTICE OF FILING OF COMPLAINTS (1) Within 10 business days of the filing of a complaint, the department shall serve notice of filing upon the parties by certified mail or personal service. The notice shall:

(a) acknowledge the filing of the complaint and state the date that the complaint was filed;

(b) include a copy of the complaint;

(c) advise the parties of the time limits applicable to complaint processing;

(d) in cases filed pursuant to 49-2-305, MCA (housing cases), advise the parties of their right to commence a civil action under 49-2-510(4)(a), MCA, in an appropriate district court, not later than two years after an alleged unlawful discriminatory practice under 49-2-305, MCA, occurred or was discovered or within two years of the breach of a conciliation agreement entered into under 49-2-504(1)(a), MCA. The notice shall state that the computation of this two-year period excludes any time during which a proceeding is pending under 49-2-510, MCA, with respect to a complaint based on the alleged discriminatory housing practice. The notice shall also state that the time period includes the time during which an action arising from a breach of a conciliation agreement is pending; (e) in cases filed pursuant to 49-2-303, MCA (employment cases), advise the parties of the respondent's obligation to preserve all personnel records relevant to the complaint until the final disposition of the complaint, pursuant to ARM 24.8.107;

(f) advise the parties of their right to receive a copy of all other information submitted with the complaint and during the investigation and right to review their file; and

(g) advise the parties that retaliation against any person because the person made a complaint or testified, assisted or participated in an investigation, a conciliation, or an administrative proceeding, is a discriminatory practice that is prohibited under 49-2-301, MCA. (History: 49-2-204, MCA; IMP, 49-2-301, 49-2-303, 49-2-305, 49-2-504 and 49-2-510, MCA; NEW, 2002 MAR p. 2908, Eff. 10/18/02.)

Rules 24.9.208 and 24.8.209 reserved

24.8.210 CONFIDENTIALITY AND RELEASE OF INFORMATION

(1) The department finds that there is a compelling state interest in the elimination of illegal discrimination in Montana pursuant to Art. II, sec. 4 of the Montana Constitution (1972). The department also recognizes that the Montana Constitution expressly provides for an individual right of privacy in Art. II, sec. 10. The department finds that in some cases, the interest of a person in viewing documents related to a complaint or an investigation will compete with individual privacy interests.

(2) If a person other than a party subject to the terms of 49-2-504(1)(a), MCA, requests information or materials for which an individual right of privacy might be asserted, or asserts a privacy interest in information or materials in the possession of the department, the department will take the following steps:

(a) The department will review the request for information or assertion of privacy rights and will attempt to contact the parties and provide them an opportunity to state why their individual privacy interests should outweigh the public's right to know.

(b) If a party objects to the release of the charge of discrimination, the department will promptly notify both parties of the objection. The department will also advise the requesting person that he or she has 10 business days from the receipt of notice of the department's refusal in which to file a written request for review of the department's decision.

(c) The department shall immediately refer a request for review under (2)(b) to the hearings bureau, and the hearings bureau shall promptly provide the parties an opportunity to be heard regarding the internal decision, under hearings bureau procedures.

(3) After a finding of reasonable cause or no reasonable cause or other agency action terminating the investigation of a case, the complaint, information obtained in the investigation of the complaint, and other information in the department file which does not relate to privacy interests protected by law, becomes public information. If a privacy interest is involved, the procedures as outlined in (2) shall apply.

(4) The department may restrict disclosure of information regarding complaints alleging violations of federal law which are within the jurisdiction of the department because of work sharing arrangements with federal agencies, pursuant to provisions of federal law.

(5) All settlement and conciliation agreements are public information except to the extent that they relate to privacy interests protected by law. A governmental entity does not have a privacy interest in any settlement or conciliation agreement. (History: 49-2-204, MCA; IMP, 49-2-501, 49-2-504 through 49-2-510, MCA; NEW, 2002 MAR p. 2908, Eff. 10/18/02.)

Rule 24.8.211 reserved

24.8.212 INVESTIGATION BY THE DEPARTMENT (1) The department's investigation shall be conducted in a fair and impartial manner. The department will normally utilize methods such as written information requests and telephone and personal interviews to obtain information in the course of the investigation, relying on more formal investigative tools such as subpoenas and depositions only after attempts to achieve voluntary cooperation have been unsuccessful.

(2) The department, in investigating a charge of discrimination under the Act, may request the commissioner to exercise any and all of the powers provided for in 49-2-203, MCA.

(3) Subject to the provisions of 49-2-506(3), MCA, the department may exercise its investigative powers in determining if a conciliation agreement is being honored or an order of the department obeyed. (History: 49-2-204, MCA; IMP, 49-2-203, 49-2-504, 49-2-506 and 49-2-509, MCA; NEW, 2002 MAR p. 2908, Eff. 10/18/02.)

Rule 24.8.213 reserved

24.8.214 INVESTIGATIVE SUBPOENAS (1) Pursuant to 49-2-203(3), MCA, a party may request that the commissioner issue subpoenas relating to a matter under investigation in order to further the department's informal investigation. Such requests shall be directed to the Commissioner, Department of Labor and Industry, P.O. Box 1728, Helena, MT 59624-1728. (History: 49-2-204, MCA; IMP, 49-2-203, MCA; NEW, 2002 MAR p. 2908, Eff. 10/18/02.)

Rule 24.8.215 reserved

24.8.216 EFFECT OF FAILURE TO COOPERATE WITH INVESTIGATION

(1) When a charging party or an aggrieved party refuses to comply with a request by the department for information or evidence reasonably necessary for the investigation, conciliation or litigation of the complaint, or fails to advise the department of a change of address causing the department to be unable to locate them, the department shall dismiss the case and issue a notice of dismissal and right to sue, or shall dismiss so much of the complaint as relates to that charging party or aggrieved party.

(2) If a respondent has been notified of a complaint and the department has requested information in the course of its investigation which the respondent fails to provide within the time specified, the department may take one or more of the following actions to complete its investigative responsibilities:

- (a) request the commissioner to issue a subpoena;
- (b) draw an adverse inference against respondent as to the evidence sought, if respondent willfully fails to produce information; and
- (c) make a finding of merit of the complaint, engage in conciliation and, if unsuccessful, set the case for contested case hearing. (History: 49-2-204, MCA; IMP, 49-2-504, MCA; NEW, 2002 MAR p. 2908, Eff. 10/18/02.)

Rules 24.8.217 through 24.8.219 reserved

24.8.220 FINDING OF REASONABLE CAUSE OR NO REASONABLE CAUSE (1)

Within 120 days (for cases filed pursuant to 49-2-305, MCA) or 180 days (for all other cases, pursuant to 49-2-504(4), MCA), the department will conclude its investigation by issuing a written finding. The finding will include a brief statement of the reasons for the department's conclusions and will be mailed to all parties.

(a) If the allegations of the complaint are supported by a preponderance of the evidence, the department will issue a finding of reasonable cause and the complaint will be certified for hearing, pursuant to 49-2-505, MCA.

(b) If the allegations of the complaint are not supported by a preponderance of the evidence, or if the department determines that it lacks jurisdiction over the complaint, the department will issue a finding of no reasonable cause. A finding of no reasonable cause will be accompanied by a notice of dismissal and right to sue in accordance with ARM 24.8.403. (History: 49-2-204, MCA; IMP, 49-2-305, 49-2-504, 49-2-505, 49-2-506 and 49-2-507, MCA; NEW, 2002 MAR p. 2908, Eff. 10/18/02.)

Sub-Chapter 3

Conciliation and Settlement

24.8.301 CONCILIATION AND SETTLEMENT (1) At any time during the complaint process, the department may undertake efforts to achieve a voluntary resolution of the case through mediation efforts with the parties. Any resolution of a complaint agreed to by the parties before the department issues a finding on the merits of the claim is referred to as a settlement agreement. Any resolution agreed to after the department issues a reasonable cause finding is referred to as a conciliation agreement. Any settlement or conciliation agreement reached while the complaint is pending in the administrative process, whether mediated by the department or agreed to by the parties independently, is subject to the provisions of this rule.

(2) If the department issues a reasonable cause finding, it shall attempt to resolve the case through conciliation. During conciliation, the department may require affirmative relief provisions to eliminate the discriminatory practice confirmed in the informal investigation. Such affirmative relief provisions may include any remedy which could be ordered by the department after hearing. If the department determines that conciliation is not possible, the department shall inform the parties in writing that the conciliation period is concluded and set the case for hearing, pursuant to 49-2-505, MCA.

(3) No statement made by any party in the course of a settlement or conciliation offer, or in any oral or written discussion concerning conciliation, will be admissible in any hearing held concerning the complaint. Agreement to a settlement or conciliation of a case does not constitute an admission of violation of any law by the respondent.

(4) A settlement or conciliation agreement reached by the parties must be in writing, signed by the parties, and approved by the department. Upon approval of a settlement or conciliation agreement, the department shall dismiss the case. Dismissal of a case based on a settlement or conciliation agreement shall constitute the end of the administrative process.

(5) A settlement or conciliation agreement may include terms for monitoring compliance with the agreement, not to extend beyond one year from the date of the agreement.

(6) The parties must inform the department of all terms of any settlement or conciliation agreement entered into while the complaint is pending in the administrative process. In addition, the parties must inform the department of all terms of any conciliation agreement entered into after the department or the commission has issued a final order.

(7) The department may refuse to approve a settlement agreement which does not resolve all allegations or remedies for all persons or groups affected by the alleged discrimination. Alternatively, the department may treat a settlement or conciliation agreement which does not resolve all allegations or remedies for all persons or groups affected by the alleged discrimination as a withdrawal in accordance with ARM 24.8.401, and may initiate the complaint as a commissioner complaint for further proceedings.

(8) A conciliation agreement may be enforced by the commissioner or by any party in the same manner as a final order of the department by seeking appropriate orders in the district court, pursuant to 49-2-508, MCA. (History: 49-2-204, MCA; IMP, 49-2-504, 49-2-505 and 49-2-508, MCA; NEW, 2002 MAR p. 2908, Eff. 10/18/02.)

Sub-Chapter 4

Dismissal and Appeal

24.8.401 WITHDRAWAL OF COMPLAINT (1) Any person who has filed a complaint with the department or any person on whose behalf a complaint has been filed may make a request in writing that the complaint be withdrawn. This request may be made at any time during the administrative process. Upon approval by the department, withdrawal of a complaint completes the administrative process.

(2) If the withdrawal is based on a private settlement agreement, a copy of the agreement must accompany the request. Private settlement agreements submitted as the basis for withdrawal are subject to the provisions of ARM 24.8.301 until completion of the administrative process.

(3) The department shall dismiss the complaint upon receipt of a written request for withdrawal of a complaint and approval of that request, except for those parts which the commissioner may initiate as a commissioner complaint. (History: 49-2-204, MCA; IMP, 49-2-210 and 49-2-501, MCA; NEW, 2002 MAR p. 2908, Eff. 10/18/02.)

Rule 24.8.402 reserved

24.8.403 DISMISSAL BY THE DEPARTMENT (1) The department shall conclude the administrative proceedings and issue a notice of dismissal and right to sue if:

(a) the department determines that it lacks jurisdiction over the allegations of the complaint;

(b) the charging party fails to cooperate in the investigation of the complaint or fails to keep the department advised of changes in address;

(c) the department determines that the allegations of the complaint are not supported by a preponderance of the evidence; or

(d) the department determines that it will not or cannot hold a hearing on the complaint within 12 months of the filing date, pursuant to 49-2-509(3)(d), MCA, and the parties do not permit the department to retain jurisdiction as provided in 49-2-505(2), MCA.

(2) A complaint may be dismissed prior to investigation if the charging party does not allege facts which, at a minimum, constitute a short and plain statement of the claim showing that the charging party is entitled to relief under Title 49, chapters 2 and 3, MCA, and has not timely amended the complaint to state a valid claim.

(3) At any time after a complaint is filed, the department may issue a notice of dismissal and right to sue without prejudice if the parties and issues before the department are also before a court of competent jurisdiction and the court's decision will be determinative of the issues before the department. If the court later finds that it does not have jurisdiction over a case in which the notice of dismissal and right to sue was issued because of the improper issuance of the notice, the charging party may apply to reopen the complaint before the department. (History: 49-2-204, MCA; IMP, 49-2-509, MCA; NEW, 2002 MAR p. 2908, Eff. 10/18/02.)

Rule 24.8.404 reserved

24.8.405 DISMISSAL BY REQUEST OF A PARTY (1) Pursuant to 49-2-509, MCA, the department shall issue a notice of dismissal and right to sue at the request of any party to a case before the department if:

(a) the department has completed its investigation of a complaint filed pursuant to 49-2-305, MCA (housing complaints); or

(b) 12 months have elapsed since the complaint was filed. (2)

The department may deny a party's request under (1) for the issuance of a notice of dismissal and right to sue if:

(a) the party requesting the issuance of the notice of dismissal and right to sue has waived the right to request filing in district court either by specific written waiver or by conduct constituting an implied waiver;

(b) the party requesting the issuance of the notice of dismissal and right to sue has filed the request more than 30 days after service of the notice of a hearing (20 days for complaints filed pursuant to 49-2-305, MCA), scheduled to be held within 90 days of the date of service of the notice of hearing; or

(c) the party requesting the issuance of a notice of dismissal and right to sue has unsuccessfully attempted through court litigation to prevent the department from investigating the complaint. (History: 49-2-204, MCA; IMP, 49-2-305, 49-2-509, MCA; NEW, 2002 MAR p. 2908, Eff. 10/18/02.)

Rules 24.8.406 through 24.8.409 reserved

24.8.410 NOTICE OF DISMISSAL AND RIGHT TO SUE; OBJECTIONS TO DISMISSAL (1) The issuance of a notice of dismissal and right to sue completes the administrative process with regard to any complaint of discrimination in which a notice of dismissal and right to sue is issued.

(2) Each notice of dismissal and right to sue issued by the department shall be issued to all parties by certified mail or personal delivery and shall set forth the following information:

(a) a statement of the reasons for issuance;

(b) a notice that in order to pursue the complaint of discrimination, the charging party must petition the district court in the district in which the alleged violation occurred within 90 days of receipt of the notice. The notice shall conspicuously state that if the charging party fails to file a petition in district court within the 90 day period, the claim shall be barred;

(c) a notice of the court's discretion to award attorney's fees to the prevailing party in a discrimination action in district court;

(d) a statement regarding the effect of the issuance of the notice of dismissal and right to sue as provided in (1); and

(e) a statement that the requirements for issuance of a notice of dismissal and right to sue have been satisfied.

(3) If a court finds that it does not have jurisdiction over a case in which the notice of dismissal and right to sue was issued because of the improper issuance of the notice, the charging party may apply to reopen the complaint before the department.

(4) A party who is dissatisfied with a decision of the department to issue or not issue a notice of dismissal and right to sue may file written objections with the commission as provided in ARM 24.9.1714. (History: 49-2-204, MCA; IMP, 49-2-509, MCA; NEW, 2002 MAR p. 2908, Eff. 10/18/02.)